No. 46775-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Brown Jr.,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00648-7

The Honorable Judge Jennifer Forbes

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that infringed Mr. Brown's Sixth and Fourteenth Amendment rights to due process and to a jury trial.

2. The prosecutor improperly asked Mr. Brown to comment on the credibility of other witnesses.

3. The prosecutor committed misconduct that was flagrant and ill-intentioned by asking Mr. Brown if he was "upset" that Jones and his mother would "make up stories about what happened that night."

   ISSUE 1: Did the prosecutor commit misconduct that was flagrant and ill-intentioned when he asked Mr. Brown if he was "upset" that other witnesses would "make up stories about what happened that night"?

4. The trial court infringed Mr. Brown's Sixth and Fourteenth Amendment right to appointed counsel.

5. The trial judge erred by failing to inquire into the conflict between Mr. Brown and his court-appointed attorney prior to trial.

6. The trial judge erred by failing to inquire into the attorney-client relationship prior to sentencing.

   ISSUE 2: Did the trial judge fail to inquire sufficiently into the relationship between Mr. Brown and his attorney?

7. Mr. Brown was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

8. Mr. Brown's convictions were obtained in violation of his right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.

9. Mr. Brown's convictions were obtained in violation of his right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

10. Defense counsel provided ineffective assistance by failing to object to improper cross-examination.

11. Defense counsel should have objected when the prosecutor asked Mr. Brown to comment on the credibility of other witnesses.

12. Defense counsel should have objected when the prosecutor suggested that Mr. Brown had an obligation to speak to the police.

13. Defense counsel should have objected before the prosecutor elicited Mr. Brown's testimony that he preferred not to speak to the police.

ISSUE 3: Did defense counsel provide ineffective assistance by allowing the prosecutor to ask Mr. Brown questions about the credibility of other witnesses?

ISSUE 4: Was Mr. Brown prejudiced by his lawyer's failure to object when the prosecutor implied that he had an obligation to speak to the police and elicited testimony about his right to remain silent?

14. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence that prejudiced Mr. Brown.

15. Defense counsel provided ineffective assistance by failing to object to law enforcement opinions that Mr. Brown was less credible than other witnesses.

16. Defense counsel provided ineffective assistance by inadvertently eliciting testimony suggesting that Mr. Brown was less credible than other witnesses.

ISSUE 5: Were Mr. Brown's convictions improperly based on the opinions of two deputies, whose characterizations of Mr. Brown's statement suggested he was less credible than Jones and his mother, in violation of his right to due process and his right to a jury trial?

ISSUE 6: Was Mr. Brown prejudiced by his lawyer's failure to object when officers improperly opined that Mr. Brown was evasive?

ISSUE 7: Was Mr. Brown prejudiced when his lawyer inadvertently elicited testimony that Deputy Cleere believed him less credible than Jones and his mother?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

James Brown and Naomi Oligaro lived together and had a daughter. Oligaro also had a sixteen-year old son named Rick Jones who lived with them. RP[1] 96, 151. Mr. Brown and Oligaro had been in a relationship 11 years. RP 152.

They didn't always agree on parenting, especially when it came to Jones. Mr. Brown's relationship with Jones had been good for many years, but was souring. RP 75. Often, Mr. Brown saw Jones as disrespectful and in need of correction, while Oligaro was more forebearing. RP 81, 93, 137, 165, 170, 180-181.

On June 25, 2014, Mr. Brown spent the day with his daughter. RP 76, 152. When he brought her home, Oligaro wanted to talk with him outside about Jones. She'd made Mr. Brown a sandwich. RP 76, 152-153, 170. Oligaro thought Mr. Brown had been drinking, which he denied. RP 77, 178, 210. They argued. Mr. Brown threw the sandwich at her, hitting her in the face with it. She pushed him away. RP 79, 153-154.

Oligaro slipped as she was pushing Mr. Brown and fell onto the ground. RP 79, 155. She called out to Jones, who was inside eating his sandwich. RP 76, 79, 97. Jones ran out and asked Mr. Brown what he

was doing to his mother. RP 82, 99, 156. The two yelled at each other, both telling the other what they would do to each other. RP 82-84, 99.

Mr. Brown—who is 54 years old and just 5'3" tall—felt threatened by the much larger, stronger, younger, and faster Jones.[2] CP 4; RP 157, 161, 168, 190, 204, 205, 209. He reached to grab for something from a corner of the garage where he kept "a lot of stuff," including sticks and tools. He "didn't really know what [he] was grabbing for." Instead, he said,

> I just grabbed something… I didn't know what I was grabbing. Whatever came out, came out.
> RP 174.

He ended up with a twelve to fourteen inch pickaxe.[3] RP 84-85, 100, 135-136, 148, 174. Mr. Brown hoped that grabbing something would keep Jones from approaching him. RP 161-163, 166, 205.

Oligaro, who is also much larger than Mr. Brown, tackled him, bit him on the leg, and took away the pickaxe. RP 86, 156, 163, 174. Mr. Brown and Jones continued to exchange insults and threats, but neither came any closer to the other. RP 86-88, 102-103.

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[1] The transcript for the trial is sequentially numbered and is cited in this brief as RP. Citations to other dates will include the date in the citation.

[2] Mr. Brown had seen Jones pick up a heavy television "like it was nothing." RP 161.

[3] Jones and Mr. Brown both said that Mr. Brown did not swing the pickaxe. Oligaro said that he did. RP 86, 101, 156, 186.

A neighbor was outside and spoke to Jones. Oligaro was trying to get Jones to stop talking, as his banter was making the problem worse. RP 87-88, 160. Jones was urging Mr. Brown to fight with him. RP 92.

Mr. Brown had made a large cross for Oligaro's family grave plot. It was in the carport, near where most of the argument took place. RP 104. He wanted to leave, and to take the cross with him. When he picked it up, Oligaro once again lunged at him, tackled him, and held him down on the ground. RP 91, 119, 122. RP 89, 158-160.

After this, the family calmed. Mr. Brown, Oligaro, and Jones reached an agreement regarding behavior Mr. Brown thought inappropriate.[4] RP 191, 199. However, a neighbor had already called the police. Officers arrived and questioned the parties. Mr. Brown volunteered to be arrested, after police had explained the mandatory arrest rule. RP 93, 106, 131, 191, 192.

No one had been hurt in the incident. RP 94.

The state charged Mr. Brown with assault two with a deadly weapon enhancement, and assault four. CP 1-3.

On the day the case was called for trial, Mr. Brown expressed confusion about the proceedings. RP 6, 12. He told the court that his

[4] Apparently, Jones had taken to walking around the house holding his crotch in front of Mr. Brown's daughter and while talking to Oligaro. RP 170, 180, 191.

attorney hadn't spent sufficient time with him and hadn't adequately investigated the case:

> I do have witnesses. He didn't bring it to my attention and let them know how I wanted to go back in because he was there when everything was going on. And I was wondering why he didn't come and question me about it, how to get in touch with him. He never did do that to me. So I was wondering why I ain't got [no] witnesses up here and going to trial, everything is so fast. I don't know what's going on here. I'm just popping up and going to trial. I ain't got no understanding about nothing about what's going on here.
> RP 12.

The trial judge told Mr. Brown to talk to his attorney about whether or not the defense would call any witnesses.[5] RP 12. She did not inquire into the relationship between Mr. Brown and his appointed attorney. RP 12.

Mr. Brown testified. He acknowledged throwing his sandwich at Oligaro. RP 153-154. When the police came, he repeatedly tried to tell them that the family had resolved some issues, and would work out any remaining problems on their own. RP 191, 192, 199, 200, 202, 206-208. However, the police didn't seem interested in the family's resolution of the problem. Instead, they just wanted to know what had happened during the incident. RP 199, 205.

[5] Defense counsel added that Mr. Brown hadn't provided him with enough information to locate his witness; however, an investigator was able to locate the witness by the next day prior to jury selection. RP 38-39.

The prosecutor asked Mr. Brown if he was upset that Oligaro "would make up a story and Rick would make up stories about what happened that night." RP 201. The prosecutor also asked Mr. Brown if he agreed that his own version of events was "dramatically different from what everybody else described?" RP 201-202.

The prosecutor also repeatedly asked Mr. Brown about his decision not to talk about the incident:

> Q: So when the deputies came to you, you knew all you had to do was tell the truth.
> A: You know, I'm a Southern guy, you know what I'm saying? I don't get in people's business. And I definitely don't tell on myself or talk to cops. I don't care how friendly they are because I know they got a job to do, and I don't want to give nobody no information.
> RP 193.

> Q: [Y]ou knew it was important to let them know that you were defending yourself, right?
> RP 195.

> Q: Did you believe it was appropriate to tell the truth when you were talking to them? …[D]id you think it was important to tell them the truth?
> A: … All I wanted to let them know, that me and Naomi could work our own problems out.
> Q: Did you think it was important to let them know you were defending yourself?
> A: [A]fter I talked to Rick and he agreed he wasn't going to do what he do, I didn't think none of it was necessary.
> RP 199.

The prosecution also presented the testimony of two officers who responded. Deputy Cleere said that he talked to Mr. Brown and that Mr.

Brown "wouldn't be specific", that he "wasn't really getting a straight story", and that the "story changed quite a bit." RP 133-134. He told the jury:

> The story just kept moving around, it just wasn't…
> RP 134.
>
> I just wanted to get his story, which wasn't forthcoming.
> RP 134.
>
> The story obviously had a lot of holes in it. It didn't make a lot of sense to me.
> RP 135.
>
> But, I mean, he was not getting specific about what happened between him and the female and her son, which is Ricky. He just, basically he would minimize it, say that they tussled. That doesn't really specifically tell me what happened.
> RP 135.

The state also offered the testimony of responding deputy Gundrum. Like the other officer, he characterized Mr. Brown as "vague", repetitive, "very general, very ambiguous". RP 145, 146.

The defense did not object to any of this testimony from the two responding officers. RP 129-149.

The jury convicted Mr. Brown as charged. CP 102-114.

Following his conviction, Mr. Brown submitted a "Public Defender Complaint Form," apparently provided by the court. Declaration of Mailing of Kitsap County Public Defender Complaint

Form, Supp. CP. He referred to the Sixth Amendment and requested an appeal, but did not spell out his complaint. Complaint Form, Supp. CP.

Mr. Brown also wrote a letter which was filed in open court on the day of sentencing. CP 99-101. In the letter, he asked for "an immediate appeal based on the total ineffectiveness of the Public Defender." CP 99. He complained that his attorney

> ...did not defend me in this case. He acted more like a mouthpiece for the prosecut[o]r than to speak on my behalf. He did not act as he vowed to act in the Rules of Professional Conduct (Rule 1.2) that he would represent me to the best of his ability... I had a witness that he did not call on though I voiced my desire to call on in trial [sic]...
>
> The first aggressor law was not even discussed in this matter. He did not advise me in this matter at all... [M]y attorney did not inform me of the first aggressor law.
>
> CP 99-101.

The judge did not make any inquiry into Mr. Brown's dissatisfaction. Instead, she proceeded to sentencing, and told him that defense counsel "was a good advocate," and "did a good job for you in the trial," and that she didn't have "any concerns in terms of the jury's verdict based on any conduct by your lawyer or lack thereof." RP (10/10/14) 8. She then sentenced him to 47 months in prison. RP (10/10/14) 10.

After sentencing, Mr. Brown timely appealed. CP 102-114.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT DENIED MR. BROWN A FAIR TRIAL.[6]

The prosecutor asked Mr. Brown to take the position that Jones and his mother had lied on the witness stand: "[Y]ou must be upset that she would make up a story and Rick would make up stories about what happened that night." RP 200-201.

A prosecutor should not "invite a witness to comment on another witness' accuracy or credibility by asking whether the witness was mistaken or lying." *State v. Walden*, 69 Wn. App. 183, 187, 847 P.2d 956 (1993). Here, the prosecutor did more than ask Mr. Brown if the others were lying; instead, he presumed Mr. Brown thought the others were lying, and asked if he was "upset" that they'd lied.[7] RP 200-201.

The problem with misconduct of this sort is twofold. First, it calls for an answer that invades the province of the jury. *Id.; State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). Second, it suggests

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[6] Prosecutorial misconduct requires reversal if it is both improper and prejudicial to the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Misconduct that is flagrant and ill-intentioned requires reversal even in the absence of an objection at trial. *Id.*

[7] He also asked Mr. Brown if he agreed that his own version of events was "dramatically different from what everybody else described?" RP 201-202.

that acquittal requires the jury to conclude that prosecution witnesses lied. *See State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).[8]

Asking one witness whether another witness is lying is flagrant misconduct. *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005). Here, the prosecutor's questions were addressed to the defendant himself (not merely a witness), and presumed that he believed the witnesses had "[made] up stories." RP 200-201.

Prosecutorial misconduct can deny the accused his right to a fair trial. U.S. Const. Amend. XIV;[9] *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). The prosecutor's misconduct in this case denied Mr. Brown a fair trial. The prosecutor should not have asked if he was "upset" that the others would "make up stories." RP 200-201.

Credibility was central to this case. Oligaro, Jones, and Mr. Brown all had different versions of what happened when he reached for the pickaxe. RP 72-112, 151-211. By asking Mr. Brown to comment on witness credibility, the prosecutor committed misconduct that likely influenced the outcome of the trial. *Boehning*, 127 Wn. App. at 525. Mr. Brown's conviction must be reversed and the case remanded for a new trial. *Id.; Glasmann*, 175 Wn.2d at 704.

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[8] In *Castaneda-Perez*, the prosecutor's questions implied that acquittal required the jury to believe that police witnesses had lied.

II. THE TRIAL JUDGE VIOLATED MR. BROWN'S RIGHT TO APPOINTED COUNSEL.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court "necessarily abuses its discretion" by violating an accused person's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court, likewise, abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel,* 136 Wn.2d 629, 965 P.2d 1072 (1998).

The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

B. The trial judge infringed Mr. Brown's right to counsel by failing to inquire into the breakdown of the attorney-client relationship, either before trial or prior to sentencing.

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[9] *See also* art. I, § 3.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused's Sixth Amendment right, even in the absence of prejudice. *Cross,* 156 Wn.2d at 607. To compel an accused to "'undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict is to deprive him of the effective assistance of any counsel whatsoever.'" *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross,* 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross,* 156 Wn.2d at 610.

The court "must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.' ...The inquiry must also provide a 'sufficient basis for reaching an informed decision.'" *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). Furthermore, "in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions." *Adelzo-Gonzalez,* 268 F.3d at 776-777. The focus should be

on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez,* 268 F.3d at 776-777.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict between Mr. Brown and his court-appointed attorney. Mr. Brown raised the issue twice: once when the case was called for trial, and once after conviction but prior to sentencing. RP 12; CP 99-101; Complaint Form, Supp. CP.

The court should have asked specific and targeted questions, encouraging Mr. Brown to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The trial court's failure to conduct a meaningful inquiry into Mr. Brown's concerns denied him his Sixth and Fourteenth Amendment right to counsel. *Cross,* 156 Wn.2d at 607. His conviction must be reversed and the case remanded for a new trial.[10] *Id.* In the alternative, the

[10] In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott,* 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

sentence must be vacated and the case remanded for appointment of new counsel pending resentencing.

III. MR. BROWN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.[11]

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance requires reversal of a conviction if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.*

A. Defense should have objected when the prosecutor asked Mr. Brown if the state's witnesses were lying.

Defense counsel did not object when the prosecutor asked Mr. Brown if he was "upset" that Jones and his mother would "make up stories about what happened that night." RP 200-201. The question infringed Mr. Brown's due process rights and invaded the province of the jury. *Boehning*, 127 Wn. App. at 525. Counsel should have objected to the misconduct.

Counsel should also have objected on relevance grounds, citing ER 402 and ER 403. *See State v. Wright*, 76 Wn. App. 811, 821, 888 P.2d 1214 (1995), *as amended on reconsideration* (Mar. 28, 1995). This is especially true because the differing accounts were almost "completely at odds," leaving "nothing… which required clarification." *Id.,* at 822.

Counsel's failure to object constituted deficient performance under *Strickland.*

B. Defense counsel unreasonably failed to object to inadmissible opinion testimony suggesting that Mr. Brown had been evasive when talking to sheriff's deputies.

1. Improper opinion testimony invades the exclusive province of the jury and violates due process.

Opinion testimony on the accused person's guilt or the credibility of a witness violates the right to trial by jury and the due process right to a fair trial. U.S. Const. amends VI, XIV; art I, § 21; *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) aff'd on other grounds, 165 Wn.2d 870, 205 P.3d 916 (2009). Neither a lay nor an expert witness may provide an opinion on the guilt of the accused "whether by statement or inference." *State v. King*, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009).

[11] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

Whether testimony constitutes an impermissible opinion of guilt depends on the circumstances of the case, including: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009).

A law enforcement officer's improper opinion testimony can be particularly prejudicial because it "carries a special aura of reliability." *King*, 167 Wn.2d at 331. Here, instead of relaying the statements they obtained from Mr. Brown, Deputy Cleere and Deputy Gundrum both provided opinion testimony undermining his credibility in comparison to that of Jones and his mother.

2. Defense counsel did not object when Deputies Cleere and Gundrum characterized Mr. Brown as less credible than Jones and his mother.

When asked about his interview with Mr. Brown, Deputy Cleere testified that he "wasn't really getting a straight story." He also opined that "[t]he story was changing quite a bit," and that "[t]he story just kept moving around." RP 134. He later said "I just wanted to get his story, which wasn't forthcoming." RP 134.

Defense counsel did not object to any of this testimony.[12]

Similarly, Deputy Gundrum testified that Mr. Brown "was being really vague," while the others had provided "significant detail." RP 145. Deputy Gundrum went on to say Mr. Brown was "[v]ery general, very ambiguous." RP 146. He later repeated that Mr. Brown provided "ambiguous answers." RP 147.

Defense counsel did not object to these characterizations.

In cases involving self-defense, an officer's opinion that one participant is less credible than the other equates to an opinion of guilt. Under the *Hudson* factors, the deputies' testimony in this case violated Mr. Brown's right to a jury trial. *Hudson*, 150 Wn. App. at 653.

The first *Hudson* factor is the type of witness: as law enforcement officers, Deputies Cleere and Gundrum were in a position to strongly influence the jury's perceptions of Mr. Brown. Instead of allowing his communication style to speak for itself, they improperly suggested that he was less credible than the other witnesses, and that his version of events was less worthy of belief. Their improper testimony was likely given special weight by the jury. *King*, 167 Wn.2d at 331.

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[12] In fact, counsel elicited similar testimony through inartful questioning: that "the story kept changing," that Mr. Brown "[k]ind of minimized everything," and "was changing information from what he originally said." RP 138-139.

The second *Hudson* factor is the nature of the testimony. The opinions here suggested that Mr. Brown was less credible than the other witnesses, and that he had something to hide. This was devastating to his claim of self-defense: it implied that Jones and his mother told the truth while Mr. Brown concealed his role in the altercation.

If the deputies had relayed their questions and Mr. Brown's answers, the jury could have made up its own mind. Jurors might well have decided that his answers reflected his communication style—evident throughout his testimony—rather than the evasiveness the deputies perceived.

The third and fourth *Hudson* factors are the nature of the charge and the defense. Here, the charge was assault and the defense was self-defense. The deputies bolstered the testimony of Jones and his mother, while undermining Mr. Brown's self-defense claim.

The fifth *Hudson* factor is other evidence before the jury. Here, the evidence was contradictory. Mr. Brown testified that he picked up the pickaxe to warn Jones off, fearing that he might be attacked, and that he did not actually use it to assault Jones. By contrast, Jones and his mother both claimed that Mr. Brown ran at Jones with the pickaxe. The deputies' opinions invited jurors to believe Jones and his mother and to disbelieve Mr. Brown.

Deputies Cleere and Gundrum invaded the province of the jury by providing opinion testimony amounting to an impermissible opinion of guilt. Their testimony violated Mr. Brown's right to a fair trial. *Hudson*, 150 Wn. App. at 653.

Defense counsel should have objected to the testimony, and should have been careful not to elicit similar testimony on cross-examination. The deputies' personal beliefs were irrelevant and should have been excluded under ER 402. They were unduly prejudicial, and should have been excluded under ER 403. They were unhelpful to the jury, and should have been excluded under ER 701. They invaded the province of the jury, and should have been kept out on that basis as well. *Id.*

C. Defense counsel unreasonably failed to object when the prosecutor suggested that Mr. Brown had an obligation to speak to police and questioned him about that obligation.

Accused persons have a constitutional privilege to remain free from self-incrimination. U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9. Courts liberally construe the constitutional provisions protecting the right to silence. *State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009).

Once an improper comment on an accused person's silence has been made, "the bell is hard to unring." *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). The situation puts defense counsel in the

difficult position of gambling on whether to ask for a curative instruction – "a course of action which frequently does more harm than good" – or ignoring the comment. *Id.*

Here, the prosecuting attorney implied that Mr. Brown had an obligation to speak with sheriff's deputies when they questioned him: "So when the deputies came to you, you knew all you had to do was tell the truth." RP 193. This was improper, and should have drawn an objection.

Defense counsel made no objection, and Mr. Brown's reply directly implicated his right to remain silent:

> You know, I'm a Southern guy, you know what I'm saying? I don't get in people's business. *And I definitely don't tell on myself or talk to cops.*
> RP 193 (emphasis added).

Having failed to object to the question, defense counsel was in no position to object to his own client's statement, or to ask for an instruction curing any prejudice. *Holmes*, 122 Wn. App. at 446.

Because of the prosecutor's improper question, the jury's attention was drawn to Mr. Brown's Fifth Amendment privilege against self-incrimination. The problem was exacerbated by the introduction of improper opinion testimony that invaded the province of the jury. RP 134, 138-139, 146-147.

Defense counsel should have objected when the prosecutor suggested Mr. Brown had the obligation to speak to police. His failure to do so fell below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862.

D. Mr. Brown was prejudiced by his attorney's deficient performance.

Defense counsel's deficient performance requires reversal when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862. In this case, defense counsel's repeated failures to object prejudiced Mr. Brown.

The outcome of the case rested on the credibility of the witnesses. Each of the witnesses had a different account of what happened when Mr. Brown held the pickaxe. RP 86, 101, 156, 186.

The officers' inadmissible opinions suggested that Mr. Brown lacked credibility. RP 134-135, 145. They went directly to the central issue in the case.

Likewise, the prosecutor's suggestion that Mr. Brown failed in his "obligation" to speak to police about the offense undermined his credibility. The inappropriate cross-examination also elevated the credibility of Jones and his mother, by contrasting their cooperation with Mr. Brown's reluctance to speak about the offense.

Finally, by asking Mr. Brown if the others were lying, the prosecutor inappropriately shifted the jurors' attention away from their proper role: determining whether the state had proved its case beyond a reasonable doubt. Instead, the prosecutor's questions implied that jurors could decide the case by determining whose account was most credible.

Defense counsel provided deficient performance by failing to object to inadmissible evidence and to improper cross-examination. Because the trial hinged on the credibility of the witnesses, there is a reasonable likelihood that the outcome would have differed had counsel raised the proper objections. *Kyllo*, 166 Wn.2d at 862. Accordingly, Mr. Brown's conviction for second-degree assault must be reversed and the case remanded for a new trial. *Id.*

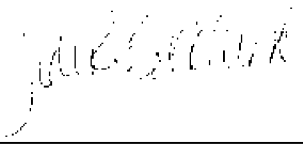
CONCLUSION

Mr. Brown's conviction for second-degree assault must be reversed, and the charge remanded for a new trial. The prosecutor committed misconduct that infringed Mr. Brown's constitutional rights. Furthermore, the trial judge failed to adequately inquire into the breakdown between Mr. Brown and his attorney. Finally, defense counsel provided ineffective assistance by failing to object to inadmissible evidence and prosecutorial misconduct that prejudiced Mr. Brown.

In the alternative, Mr. Brown's case must be remanded for a new sentencing hearing. After conviction and before sentencing, the trial judge failed to make any inquiry into the breakdown of the attorney-client relationship.

Respectfully submitted on March 18, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

James Brown, DOC #852638
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

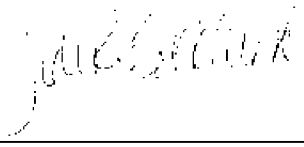
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 18, 2015.



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